

**National Headquarters**

1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331
www.defenders.org

August 12, 2008

Alan Risenhoover
Director, Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway, SSMC 3
Silver Spring, MD 20910

Submitted via email: NEPAprocedures@noaa.gov

RE: MSA Environmental Review Procedures; Comments on Proposed Rule, 73 Fed. Reg. 27998 (May 14, 2008).

Dear Mr. Risenhoover:

On behalf of the over 1 million members and supporters of Defenders of Wildlife ("Defenders"), I am writing to oppose the rule proposed by the National Marine Fisheries Service ("NMFS") to amend the environmental review procedures applicable to fishery management actions taken pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). 73 Fed. Reg. 27,998 (May 14, 2008). Defenders is dedicated to the conservation of all native wild plants and animals in their natural communities, including in the marine environment, and relies on the robust implementation and enforcement of important environmental laws like the National Environmental Policy Act ("NEPA") to achieve its organizational goals. We believe that the rulemaking required by the 2006 reauthorization of the MSA provided NMFS an important opportunity to improve implementation of NEPA in fishery management decisions. Disappointingly, the agency has not taken this opportunity for improvement, and instead has moved in the opposite direction, proposing to roll back NEPA protections for ocean ecosystems. This was not the intent of Congress in its recent reauthorization of the MSA, and certainly not its intent in the original enactment of NEPA. Accordingly, we urge NMFS to withdraw its proposed rule and develop a new proposal that streamlines the NEPA and MSA decision making process and at the same time maintains robust requirements for neutral decision making, public participation, agency oversight and accountability, and in-depth environmental review.

NMFS's proposed rule errs in assuming that fundamental departures from established NEPA procedures are necessary or appropriate.

The 2006 MSA reauthorization required NMFS to "revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4231 et seq.)." 16 U.S.C. § 1854(i)(1) (emphasis added). The Senate Report accompanying the legislation emphasized that such changes were to be procedural only, and not involve any substantive changes either to NEPA or its

regulations: "The intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation, but to establish one consistent, timely, and predictable regulatory process for fishery management decisions. . . ." 73 Fed. Reg. at 28,000 (quoting S. Rept. 109-229, at 8 (emphasis added)). In the House of Representatives, Rep. Rahall confirmed this point, stating:

Notwithstanding efforts by this Congress to undermine the National Environmental Policy Act, H.R. 5946, as amended, requires full compliance with the law. The Secretary of Commerce is directed to update the procedures for complying with NEPA, but these new procedures will not supersede existing NEPA regulations and guidance issued by the Council on Environmental Quality.

Statement of Rep. Rahall, December 8, 2006 (emphasis added), 152 Cong. Rec. E2243 (December 27, 2006 Extension of Remarks).

Thus, NMFS received explicit instructions from Congress that its proposed rule should be confined to procedures to implement NEPA, and that the regulations and guidance of the Council on Environmental Quality ("CEQ") would continue to apply in full to fishery management decisions. The CEQ regulations themselves state that they are "applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA], except where compliance would be inconsistent with other statutory requirements," and that "[t]he provisions of [NEPA] and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law." 40 C.F.R. § 1500.3.

NMFS has not attempted through its proposed rule to demonstrate that compliance with NEPA and the existing CEQ regulations would be inconsistent with the requirements of the MSA. Instead, the agency makes only vague allusions to this effect to justify its diversion from the CEQ regulations and traditional NEPA compliance. See, e.g., 73 Fed. Reg. at 28,001 (stating that maintaining the use of environmental impact statements, environmental assessments, and categorical exclusions as provided for in the CEQ regulations "would negate the opportunity for improvements to the NEPA process for MSA actions as intended by the MSRA"). The fact is that there simply is no inconsistency between NEPA and the MSA. The Marine Fish Conservation Network submitted to the agency a proposal that would meet the requirements of the 2006 MSA reauthorization to streamline and coordinate the timeframes for NEPA and MSA compliance, yet maintain NEPA's full applicability. See June 8, 2007 letter from Lee R. Crockett, Executive Director of Marine Fish Conservation Network, to Dr. William Hogarth, Assistant Administrator for NMFS (attached). Defenders supports the Network proposal and believes NMFS must take a hard look at this approach and explain to the public why it would not be feasible.

NMFS's apparent conviction, without a reasoned basis, that fundamental departures from established NEPA procedures are necessary to facilitate fishery management under the MSA underlies its entire proposal, and constitutes a basic error in judgment requiring withdrawal of the proposed rule.

Specific flaws in NMFS's proposed rule

In addition, the proposed rule contains several specific defects that further require reexamination of the agency's proposal. Among the proposed rule's flaws, it:

- **Undermines neutral decision making by allowing individuals with financial interests to control the environmental review and public participation process.**

One of the biggest problems with the proposed rule is its delegation of power over the NEPA process to the fishery management councils. Although the preamble to the proposed rule states that NMFS will "bear[] ultimate responsibility for compliance with the MSA and NEPA," 73 Fed. Reg. at 28,005, the proposed rule delegates to the fishery management councils responsibilities for scoping, review and response to comments on the draft environmental document, and for contracting out preparation for the final environmental document. The fishery management councils are not federal agencies, however, and cannot properly carry out these central functions of the NEPA process, which are entrusted by law to federal agencies.

The fishery management councils are advisory bodies created by the MSA to assist NMFS with fishery management decisions, and are often dominated by members with financial interests in the fisheries they manage. Thus, the councils may be faced with strong conflicts of interest that prevent them from taking the "hard look" at the environmental consequences of their management actions that NEPA requires. To carry out the NEPA process, the councils also will undoubtedly be faced with evaluating issues that are beyond the scope of their narrow expertise in fisheries management. NEPA requires an examination of the effects of fishery management actions on the broader ocean ecosystem, an aspect that does not receive sufficient attention under the agency's proposed rule (see also comments on experimental fishing permits, below).

As the federal agency responsible for implementation of the MSA, NMFS must recognize its central responsibility in implementing NEPA, including the basic elements of scoping, identification of alternatives, preparation of draft and final NEPA documents (or supervision of the preparation of such documents by qualified contractors selected by the agency itself), and review and response to public comments. It may be helpful to seek ways to involve the fishery management councils in that process, but NMFS may ultimately do so only in a manner that recognizes the councils' advisory role and maintains the agency's responsibility for implementing the NEPA process.

- **Undermines public input by allowing fishery management councils to control the timing, location, and delivery of public comments, including reducing the amount of time to review and comment on complicated actions.**

As part of the substantial delegation of the NEPA process to the fishery management councils discussed above, NMFS's proposed rule creates a two-tiered system of public comment that, even while giving the public an "extra" opportunity to comment, significantly diminishes their ability to make those comments count. The first comment period under NMFS's proposed rule would be to the fishery management councils. During this comment period, the standard 45-day minimum provided for by the CEQ regulations could be reduced to as little as 14 days for a variety of reasons introduced for the first time through this proposed rule. The second comment period under the proposed rule would be to NMFS itself on the final environmental document, but would focus solely on issues related to legal compliance with the MSA and NEPA. Substantive issues not raised to the fishery management councils at the draft stage could not be considered by NMFS, regardless of whether the first comment period afforded adequate time for public review or the complexity of the issues to be discussed.

To remedy the deficiencies in this aspect of the proposed rule and ensure full public input in the decision making process, NMFS first must resume control of the NEPA process, from scoping through the final decision. Beginning with scoping, 40 C.F.R. § 1501.7 provides that scoping should be "early and open" and "invite the participation of ... interested persons." This aspect of early public involvement is an aspect of NEPA implementation in fishery management that has long needed reform and improvement. Fishery management council meetings and agenda notices are not sufficient to ensure full participation from the public, but rather are targeted only at narrow fisheries interests. NMFS must ensure that public hearings are held in locations that are accessible to the general public, and that they focus on where the effects of the action are likely to be felt on an ecosystem level, rather than only on where the action will be initiated and fisheries interests will be affected.

At the draft environmental document comment stage, Defenders agrees that such public engagement should occur before fishery management councils vote on their proposed actions, and we commend the agency for its attempt to make NEPA relevant to this critical phase in the fishery management decision process. However, even where the comment period is integrated with the fishery management council's decision making, the comment process ultimately should be controlled by NMFS. There is no justification for excluding the agency at this stage in the process and limiting their involvement to responses to comments regarding the legality of the council's actions. In addition, it is not clear how the agency can distinguish effectively between comments addressing the substance of the environmental document and those raising issues of legal adequacy. For example, the preamble to the proposed rule states that comments on the range of alternatives considered in the draft environmental document must be addressed to the fishery management councils at the draft stage. The adequacy of the range of alternatives considered is a critical element for NEPA compliance, however, which NMFS must be given the opportunity to evaluate. The same is true for many other "substantive" aspects of the draft environmental document. Bifurcating these important issues between the fishery management councils and NMFS will inevitably confuse the public, and result in NMFS disregarding comments conveying important information and perspectives on environmental issues, to the detriment of the NEPA process. NMFS should retain control of the comment process, and consider all comments that raise substantive issues without the artificial and unworkable division between substance and legality suggested in the proposed rule.

The length of the comment period allowed on draft environmental documents is also critical to the ability of the public to engage in the decision making process. Given the length and complexity of fishery management documents, 14 days simply is not enough time for the public to engage in the process in a meaningful way. In addition, the proposed rule's provisions for reduction of the comment period arguably conflict with CEQ regulations that vest this discretion in EPA for "compelling reasons of national policy." 40 C.F.R. § 1506.10(d). NMFS should drop from the proposed rule the provisions for shortening the comment period, and maintain the provisions of the CEQ regulations.

- **Undermines accountability and consistency by creating an entirely new environmental document with new requirements.**

The proposed rule creates a new environmental document, the Integrated Fishery Environmental Management Statement ("IFEMS"). Although the agency implies that the new document would fulfill the legal role of an EIS under NEPA, the precise nature of the new

document, and the extent to which it will in fact fully comply with the requirements for an EIS, is unclear. NMFS's preamble to the proposed rule states:

The proposed name change from [environmental impact statement] to [integrated fishery environmental management statement] is intended to make clear that the requirements applicable to an IFEMS are distinct from those applicable to an EIS, especially in terms of procedure and timing, but also regarding the identification of alternatives, how to deal with incomplete information, and the requirement to analyze cumulative impacts.

73 Fed. Reg. at 28,004 (emphasis added). The proposed rule itself states that the IFEMS "will meet the policies and goals of NEPA," 73 Fed. Reg. at 28,014 (emphasis added), but does not state that the IFEMS will fully meet the legal requirements for an EIS under the statute and CEQ regulations. Indeed, even the preamble and the text of the proposed rule seem to conflict on this issue, leaving the public unclear as to just how distinct NMFS intends for these documents to be.

To comply with NEPA, an environmental document must fully comply with the required elements for an EIS specified in NEPA and the CEQ regulations. Although CEQ guidance recognizes that agencies may find it helpful to integrate their EISs into larger agency planning documents, CEQ makes clear that the environmental analysis of the EIS must be distinct and separately identified within such an integrated planning document. See CEQ "Forty Most Asked Questions, 46 Fed. Reg. 18026 (March 16, 1981) (Question 21, Combining Environmental and Planning Documents: "The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of reasonable alternatives.")). Although NMFS is thus free to suggest ways to better integrate NEPA and fisheries management decision making, including ways to integrate NEPA analysis into a fishery management plan, it must ensure that the environmental analysis contained in any such integrated document is as thorough and complete as that in a free-standing EIS, and should require that the portion of any combined document that serves as the EIS be clearly demarcated.

The agency's identification of a new hybrid environmental and fishery management document, the "IFEMS," does not comply with CEQ's direction for clear identification of the elements of the EIS in a combined planning document. The new terminology, combined with the agency's vague language in the preamble, will inevitably confuse the public and the fishery management councils themselves regarding whether the new document is intended to comply fully with NEPA's requirements or instead establish a shortcut around them. Indeed, under one interpretation of the proposed rule's and preamble's language, the agency could be trying to remove itself from the umbrella of 30 years of established NEPA caselaw and move itself closer to the "functional equivalence" approach of exempting MSA actions from NEPA advocated by fishing industry representatives during the 2006 MSA reauthorization. This approach was specifically rejected by Congress, of course, which explicitly directed that fishery management actions were to remain subject to full NEPA compliance. NMFS should accordingly clarify in a new proposed rule that all elements of a traditional environmental impact statement will continue to be required, and should ensure that those elements are distinctly identified in any combined environmental analysis and planning document.

- **Undermines comprehensive environmental review by improperly expanding categorical exemptions for actions with potentially significant environmental consequences.**

Finally, the proposed rule would "establish a new [categorical exclusion] category for experimental fishing activities permitted under an [experimental fishing permit], where the fish to be harvested have been accounted for in other analyses." 73 Fed. Reg. at 28,008. The focus of this proposed categorical exclusion on the impact on the targeted fish stock is far too narrow, however. Unlike the MSA, which is largely focused on target stocks, NEPA requires thorough investigation of impacts on the broader marine environment. The proposed categorical exclusion could thus permit significant environmental impacts, in violation of the CEQ regulations governing such exclusions. For example, the Pacific Fishery Management Council has been considering an experimental fishing permit that would allow longline fishing for swordfish in a leatherback sea turtle protected area. The purpose of this experimental fishing permit is to determine whether a new gear configuration can reduce the capture of a highly endangered species. Thus, the proper issue for concern is not "the fish to be harvested" and whether they have already been accounted for, but how endangered leatherback sea turtles will be impacted. Under NMFS's proposed rule, this environmentally significant activity could be subject to a categorical exclusion, eliminating any environmental review under NEPA. NEPA demands more than just this narrow focus.

Conclusion

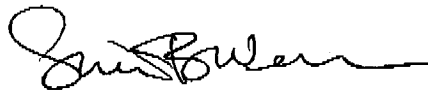
As noted above, the 2006 MSA reauthorization presented NMFS with an opportunity to significantly improve decision making through the use of NEPA in fishery management actions. Unfortunately, the agency's proposed NEPA rules do not fulfill this mandate. Instead, NMFS has proposed changes to longstanding NEPA procedure that will likely lead to more confusion and litigation. Although we commend the agency for its proposal to start the NEPA process and engage the public early so that fishery management decisions can be influenced by the analyses and public input required through NEPA, we do not believe that important elements of the agency's proposal are consistent with the requirements of NEPA and the 2006 MSA reauthorization. We urge the agency to withdraw the proposed rule and revisit the proposal of the Marine Fish Conservation Network that would maintain strong NEPA review while streamlining this process.

Thank you for your attention to these comments and we look forward to working with you further on developing a NEPA process for fishery management actions that will best coordinate the requirements and timelines of NEPA and the MSA. Our oceans are facing too many challenges to scrimp on NEPA now. Please feel free to contact us at 202-682-9400 if you have any questions about these comments.

Sincerely,



Robert Dreher
Vice President for Conservation Law



Sierra B. Weaver
Staff Attorney



June 8, 2007

Dr. William Hogarth
Assistant Administrator
NOAA Fisheries
BLDG: SSMC3 RM: 14564
1315 East-West Highway
Silver Spring, MD 20910-3282

Dear Dr. Hogarth:

Thank you for taking the time to meet with me and other members of the Marine Fish Conservation Network (Network) to discuss the National Marine Fisheries Service's (NMFS) efforts to revise its procedures to comply with the National Environmental Policy Act (NEPA) and the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA). At the meeting, you indicated that it would be useful for the Network to submit a schematic summary of how NMFS can best "integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to [the MSRA]," 16 U.S.C. § 1854(i)(B).

Attached to this letter is a flow chart illustrating our recommended approach to integration (Attachment 1). Following joint planning identifying general fishery management needs well in advance of when the actions must be taken, a specific proposed action and alternatives should be outlined by NMFS and the councils before the FMP or amendment is drafted. See Attachment 1; see also the Network's April 20 Comment Letter at 3 (Attachment 2). Thereafter, NMFS should prepare the draft environmental impact statement (DEIS) as the council drafts the FMP or amendment. During the comment period on the DEIS, the council would continue its ordinary meetings and revisions to the draft FMP. NMFS could then finalize the EIS at the same time the council transmits the revised FMP or amendment to the Secretary for review. The comment periods on the FMP or amendment and the EIS could then run concurrently beginning five days later when the Secretary issues the notice stating the plan is available for review. Provided that NMFS prepares thorough EISs when necessary, short-term or annual actions such as quota setting could be accomplished using EAs that take far less time to complete. This process would result in NEPA analysis being available earlier in the FMP or amendment development process, thereby providing valuable information to the Councils, the public, and NMFS *before* decisions are made.

This approach, while differing from how NMFS currently conducts NEPA analysis, is practical and consistent with the agency's existing NEPA guidance. See, e.g., NAO 216-6 § 5.01b.2 (environmental review to be "initiated as early as possible in the planning process"). As our April 20 letter and the attached flow chart make clear, the agency can integrate NEPA and the MSRA without sacrificing the important goals of NEPA. If you or your staff has any questions, please feel free to contact Ken Stump on the Network's staff at (202) 543-5509.

Sincerely,



Lee R. Crockett
Executive Director

Attachments

Attachment 1

Marine Fish Conservation Network Streamlining Opportunities

Integrating NEPA Environmental Review and MSA Fishery Management Plan Development

